Chicago-Kent Law Review

Volume 48 | Issue 2 Article 6

January 1971

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CONGLOMERATE MERGERS AND THE I.T.T. CONSENT DECREES

A litigant can rarely lose every battle and yet win the war. However, that is just what happened when the Department of Justice attacked three acquisitions of the International Telephone and Telegraph Corporation as violating Section 7 of the Clayton Act.[1] In *United States v. International Tel. & Tel.*,[2] filed in April, 1969, the government sought to force I.T.T. to divest itself of Canteen Corporation. In *United States v. International Tel. & Tel. and Grinnell Corp.*[3] and *United States v. International Tel. & Tel. and The Hartford Fire Insurance Company*,[4] both filed in August, 1969, the government sought to prevent the proposed acquisitions of Grinnell Corporation and the Hartford Fire Insurance Company by I.T.T. In the last two actions, the government also sought preliminary injunctions preventing the acquisitions. The court refused to issue an injunction in either case in October, 1969.[5] Then in December, 1970, the trial court found that I.T.T. was entitled to a motion dismissing the complaint in the case of the Grinnell acquisition.[6] In July, 1971, the trial court in the Canteen Corporation case found that I.T.T. was also entitled to a judgment dismissing that complaint.[7] Thus, the Justice Department lost final judgments to I.T.T. in two of the three cases and a preliminary injunction had been denied in the third.

Nevertheless, the government appears to have won the war, since, in September, 1971, consent decrees were entered in all three cases.[8] These consent decrees provide for divestiture by I.T.T. of Canteen Corporation[9] and the Fire Protection Division of Grinnell Corporation[10] within two years. In addition the decrees require I.T.T. to divest itself of either (1) the Hartford Fire Insurance Company or (2) Avis Rent-A-Car, I.T.T.-Levitt and Sons, Inc. and its subsidiaries, I.T.T. Hamilton Life Insurance Company, and I.T.T. Life Insurance Co. of New York within three years. Further, if I.T.T. does not divest itself of Hartford, it is restrained from acquiring any leading domestic company or dominant company in a concentrated market without showing in court that such acquisition would not lessen competition or tend to create a monopoly in any line of commerce in any section of the country.[11] Thus, the government received nearly all the substantive relief it had originally sought in filing the actions. The government, however, failed to get a definitive Supreme Court rul-

1 15 U.S.C. § 18 (1970).
2 1971 Trade Cas. 90, 530 (N.D. Ill. July 2, 1971).
3 324 F. Supp. 19 (D. Conn. 1970).
4 Civil Action No. 13320 (D. Conn., filed August 1, 1969).
5 United States v. International Tel, & Tel., 306 F. Supp. 766 (D. Conn. 1969).
6 United States v. International Tel. & Tel., 324 F. Supp. 19 (D. Conn. 1970).
7 United States v. International Tel. & Tel., 1971 Trade Cas. 90, 530 (N.D. Ill. July 2, 1971).
8 521 B.N.A. Antitrust & Trade Reg. Rept. A-4 (Sept. 28, 1971).
9 1971 Trade Cas. 90,774 (filed August 23, 1971).
10 1971 Trade Cas. 90,763 (entered Sept. 24, 1971).
11 1971 Trade Cas. 90,766 (filed Aug. 23, 1971).

ing on the novel arguments presented in attacking these mergers. Therein lies the quandry for attorneys in the field. These novel arguments had been rejected by the district courts. Why, then, had I.T.T. agreed to the consent decree? Did I.T.T. believe that these arguments would succeed in the Supreme Court? This article will examine these arguments and explore their probabilities of success.

Over forty-five years ago the Supreme Court emphasized that each antitrust case was *sui generis* and that the facts of each precedent must be closely examined before applying them to any other situation.[12] Though a trial court no longer must undertake an exhaustive economic analysis in every merger case,[13] at least some understanding of the economic effects of a merger is necessary.[14] Consequently, a brief look at the status of the companies involved in the I.T.T. acquisitions is necessary.

In 1968, the year prior to the filing of the suits, I.T.T. was the eleventh largest industrial concern in the United States. Its revenues were just over four billion dollars that year. Its holdings in 1968 included Continental Baking Company, the largest baking company in the U.S.; Sheraton Corporation of America, one of the two largest hotel chains in the nation; Levitt & Sons, Inc., the nation's largest residential construction firm; and Avis, Inc., the second largest car rental company.

In April, 1969, I.T.T. acquired Canteen Corporation, Hartford Fire Insurance Company and, Grinnell Corporation. At that time Canteen was one of the few nationwide food vending organizations, with operations in 43 states. Canteen had 1968 revenues of $322 million, 95 percent of which came from merchandise and equipment sales. Canteen ranked second among companies operating in the on site food service market. Hartford Fire Insurance Company was the fourth largest property and liability insurance company in the country. Hartford had 1968 revenues of $968.8 million. Grinnell Corporation was the largest manufacturer and installer of automatic sprinkler fire protection systems in the country. Grinnell had revenues of $341.3 million in 1968 and was the 268th largest industrial corporation in the United States. By acquiring these three companies, I.T.T. could expect to increase their 1968 revenues of $4 billion by at least $1.5 billion.

In light of the Justice Department's avowed intention to attack any merger among the top 200 manufacturing firms or firms of comparable size in other industries,[15] the vigorous attack on I.T.T.'s acquisitions is not surprising. What may be more surprising is that none of the government's arguments about the effects of these acquisitions were able to convince the trial judges that:

[12] Maple Flooring Association v. U.S., 268 U.S. 563, 579 (1925).

[13] United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).

[14] *Id.* at 362.

[15] Address by Attorney General John N. Mitchell before the Georgia Bar Association, June 6, 1969, 5 C.C.H. Trade Reg. Rept. 55,505 (June 19, 1969).

> [I]n any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[16]

To understand this phenomenon an analysis of the government's principal arguments is each case is required.

The government's complaint in the Canteen case[17] is primarily founded on the increased power of I.T.T and Canteen to employ reciprocity or benefit from reciprocity effect in the furnishing of vending and in-plant feeding services. In addition, the complaint alleges that the merger will foreclose competitors from vying for I.T.T.'s food service business; the merger will raise barriers to entry in this market and will trigger other defensive mergers.[18] With respect to the first allegation, the court found that since no significant increase in opportunities for reciprocal dealing was shown, and since I.T.T. would probably not utilize these opportunities if they did exist, no substantial adverse effect on competition was likely.[19] The court also found that the vertical foreclosure of Canteen's competitors from I.T.T.'s locations, even if it were to occur, would foreclose less than one-half of one percent of the market and would be de minimus.[20] Finally, since no likelihood of reciprocity effects or significant vertical foreclosure existed the court rejected the government's contention that these competitive advantages would hinder entry into the market or trigger other mergers.[21] Consequently, the government's complaint was dismissed on the merits.

In the case of the Grinnell acquisition,[22] the government first alleged that Grinnell was a dominant competitor in certain lines of commerce in certain sections of the country.[23] The government then alleged that this dominant competitor would receive certain competitive advantages from the merger and thus substantially lessen competition. The primary competitive damage alleged was increased opportunity for reciprocity. In addition, the government also alleged that the merger would permit Grinnell to sell complete packages or systems, obtain leads for sales of sprinkler systems from Hartford agents, foreclose Grinnell's competitors from competing for I.T.T.'s business, and give Grinnell access to I.T.T.'s financial and advertising resources.[24] Finally, the government alleged that this merger would increase economic concentration and result in injury to competition in numerous undesignated lines of commerce.[25]

16 15 U.S.C. § 18 (1970).
17 United States v. International Tel. & Tel., 1971 Trade Cas. 90,530 (N.D. Ill. July 2, 1971).
18 *Id.* at 90,535.
19 *Id.* at 90,548.
20 *Id.* at 90,559.
21 *Id.* at 90,560.
22 United States v. International Tel. & Tel., 324 F. Supp. 19 (D. Conn. 1970).
23 *Id.* at 24.
24 *Id.* at 30.
25 *Id.* at 52.

The trial court emphatically rejected the government's first contention, that Grinnell was a dominant competitor in any relevant produce or geographic market.[26] Then, though the court said it need not have reached these questions, it decided that even if Grinnell were a dominant competitor none of the allegations of competitive advantages were substantiated. The court found that increased reciprocity was not likely to result from the merger.[27] As to the rest of the alleged advantages, the court either found that they were not truly advantages or that they were not likely to occur.[28] Finally, the court rejected the argument that increased economic concentration was forbidden by Section 7 of the Clayton Act. The court acknowledged that concentration in a particular market was a relevant concern of the statute, but rejected as irrelevant the argument that conglomerate mergers were causing concentration of resources in the entire domestic economy.[29]

The Justice Department's action attacking the I.T.T.-Hartford acquisition never came to trial. However, the gist of the government's complaint, and of the court's reaction to it, can be determined from the court's decision in refusing a preliminary injunction.[30]Again in this case, the government alleged that the acquisition would result in a market structure conducive to reciprocal dealing.[31] It also alleged a substantial vertical foreclosure of I.T.T.'s insurance business to Hartford's competitors.[32] In addition, the government claimed that I.T.T. and its subsidiaries would receive an advantage over their competitors by having access to $400 million in excess funds held by Hartford.[33] The government also alleged that the merger would eliminate potential competition between I.T.T. and Hartford, since Hartford was studying diversification as a way to utilize its $400 million surplus.[34] Finally, the government again alleged that the merger would further accelerate the trend of increasing concentration in the economy and thus would have anti-competitive effects.[35]

In refusing the preliminary injunction, the court decided that the government had not demonstrated a reasonable probability that it would be successful in sustaining any of its allegations at trial. As to reciprocity, the court found that the government had neither shown that the merger created substantially increased opportunities for reciprocity, nor that such opportunities, even if created, were likely to be exploited.[36] The vertical foreclosure was found to be insubstantial, or at least not large enough, by itself to make the merger invalid.[37]

26 *Id.* at 29.
27 *Id.* at 46.
28 *Id.* at 47.
29 *Id.* at 53.
30 United States v. International Tel. & Tel., 306 F. Supp. 766 (D. Conn. 1969).
31 *Id.* at 786.
32 *Id.* at 792.
33 *Id.* at 791.
34 *Id.* at 795.
35 *Id.* at 796.
36 *Id.* at 791.
37 *Id.* at 795.

The court held further that the government had not shown a probability that Hartford's surplus would be used by I.T.T. subsidiaries.[38] The court also held that the government had made no showing that the merger eliminated potential competition between I.T.T. and Hartford.[39] Finally, the court found no merit to the government's claim that economic concentration in the aggregate, rather than in a particular market, was violative of the Clayton Act.[40]

These three cases together represent the Justice Department's most ambitious attack on conglomerate mergers to date. As such, they present several novel theories of attack on conglomerates. The first new theory they seek to establish is that a mere potential for reciprocity is adequate to invalidate a merger. The second new theory is that Section 7 of the Clayton Act was intended to remove the anti-competitive effects of concentration of assets in the economy as a whole as well as concentration in a particular line. The last new theory is that two corporations with plans to diversify are potential competitors and their merger may substantially harm competition.

Nothing is novel about attacking mergers because of reciprocity. The Supreme Court in *Federal Trade Commission v. Consolidated Foods Corp.*[41] made it clear that reciprocity is one of the anti-competitive practices which the antitrust laws are intended to counteract. The Court held that reciprocity violates Section 7 of the Clayton Act if the probability that it will lessen competition is shown.[42] Thus, the novel point argued in the I.T.T. cases was the nature of the proof necessary to show that probability. The government argued that a showing that opportunities for reciprocity were substantially increased was adequate. Their argument was strongly supported by two cases decided in the Third Circuit, *Federal Trade Commission v. Ingersoll-Rand Co.*[43] and *Allis-Chalmers Mfg. Co., v. White Consolidated Industries, Inc.*[44] However the trial courts felt that I.T.T. had shown a strong corporate policy against reciprocity and, because of their profit center structure, effectively discouraged it. In the absence of proof of these corporate policies, the government's argument on reciprocity would probably have been accepted by the courts.[45] The conclusion must be, therefore, that proof of a market structure significantly increasing the opportunities for reciprocity remains an important means of attack on conglomerate mergers.

Like reciprocity, the government's theory of the anti-competitive effects of eliminating potential competition is simply an extension of accepted law.

38 *Id.* at 792.
39 *Id.* at 795.
40 *Id.* at 796.
41 380 U.S. 592 (1965).
42 *Id.* at 595.
43 320 F.2d 509 (3d Cir. 1963).
44 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).
45 *See, e.g.*, United States v. International Tel. & Tel., 306 F. Supp. 766, 783 (D. Conn. 1969).

United States v. Continental Can Co.[46] made it clear that mergers between two competitors may violate the antitrust laws, even if the competitors produce goods as different as metal cans and glass containers. Further, *United States v. Penn-Olin Chemical Co.*[47] stated that a combination between two potential entrants to a market for the purpose of jointly entering that market is also within the scope of the anti-trust laws. In that case, however, the district court on remand decided that neither joint venturer would have entered the particular market alone and consequently no violation occurred.[48] In *Hartford*, though, the government could point to no particular industry and say that both I.T.T. and Hartford were potential entrants. The mere fact that both were considering diversification does not meet the *Penn-Olin* requirement that a reasonable probability exist that both would have entered a particular market.[49] In fact, since both companies' diversification studies were so wide-ranging, the mathematical probabilities that they would have chosen to enter the same market seems very small indeed. Therefore, the application of the doctrine of potential competition to conglomerate mergers appears to be largely foreclosed by the diversified nature of the conglomerates themselves.

The last new theory presented by the government in attacking the I.T.T. mergers is that the merger will impair competition by increasing economic concentration. Economic concentration in a particular line of commerce has long been a relevant concern in considering the anti-competitive effects of a merger.[50] The reason the alleged effect must be limited to a particular line of commerce is not clear. The words of the Clayton Act say that the requisite standard is met if competition is impaired "in any line of commerce in any section of the country."[51] The House report on the bill said that: "[T]he purpose of the bill is to protect competition in each line of commerce in each section of the country."[52] While the intention of the statute is directed toward preserving competition in each line of commerce, it does not follow that concentration only in a particular line of commerce can harm that line of commerce. For example, concentration in the American steel industry certainly could have a harmful effect on the auto industry. The court decisions, too, seem to justify a broader interpretation if their method of determining a relevant market is examined. In *United States v. Continental Can Co.*,[53] for instance, the Court recognized a line of commerce that included metal cans and glass bottles because what happened in one of those lines affected the other. Thus, if the government could show a casual relationship between conglomerate mergers and harmful effects in several different markets, their argument should be accepted.

46 378 U.S. 441 (1964).
47 378 U.S. 158 (1964).
48 United States v. Penn-Olin Chemical Co., 246 F. Supp. 917 (D. Del. 1965).
49 United States v. Penn-Olin Chemical Co., 378 U.S. 158, 175 (1964).
50 *E.g.*, United States v. Von's Grocery, 384 U.S. 270 (1966).
51 15 U.S.C. § 18 (1970).
52 H.R. Rep. No. 1191, 81st Cong., 1st Sess., 8 (1949).
53 378 U.S. 441 (1964).

Certainly such effects are within the purview of congressional intent in passing Section 7 of the Clayton Act and within the logic of court interpretations of the Act. Therefore, an argument which attacks a merger on the basis of these effects could be successful.

Conclusion

The trial courts refused to accept any of the three novel theories advanced by the Justice Department in attacking the three I.T.T. mergers. Nevertheless, I.T.T. respected the government's arguments enough to agree to a consent decree. On closer examination, at least two of these three novel theories seem to have some chance for success had they been argued before the Supreme Court. Thus, these arguments will probably continue to be valuable to the government in attacking future conglomerate mergers.

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